EXHIBIT TO MOTION FOR ORDER STAYING ISSUANCE OF MANDATE.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 591

BETHLEHEM STEEL COMPANY,

Petitioner,

against

ANGLO-CONTINENTALE TREUHAND, A. G., a Liechtenstein corporation, N. V. ANGLO-CONTINENTALE TRUST MAATSCHAPPIJ (ANGLO-CONTINENTAL TRUST COMPANY), a Netherlands corporation, MONDIALE HANDELS-UND VERWALTUNGS, A. G., a Liechtenstein corporation, and HYDROPRESS HANDELS, A. G., a Liechtenstein corporation,

Respondents.

RESPONDENT'S PETITION FOR REHEARING.

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SUBJECT INDEX.

PAGE

Petition for Rehearing 1
Certificate of Counsel 12

TABLE OF CASES.

Apollon, The, 9 Wheat. 362 (1824) 7
Bethlehem Steel Company v. Zurich General Accident & Liability Insurance Company, Ltd., No. 590, October Term, 1938 2
Burns Mortgage Co. v. Fried, 292 U. S. 487 (1934) 4
Chase National Bank v. Faurot, 149 N. Y. 532, 536 (1896) 5
Chemical Bank & Trust Company v. Henwood et al., No. 495, October Term, 1938 2
Cunningham v. Pressed Steel Car Co., 238 App. Div. (N. Y.) 624, aff'd 263 N. Y. 671 (1934) 5
Enoch v. Brandon, 249 N. Y. 263 (1928) 5
Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938) ... 4
Evertson v. National Bank of Newport, 66 N. Y. 14 (1876) 5
General Investment Company v. Interborough Rapid Transit Company, 200 App. Div. (N. Y.) 794, 800, aff'd 235 N. Y. 133 (1923) 5
Guaranty Trust Company of New York v. Henwood et al., No. 384, October Term, 1938 2
Liverpool Steam Company v. Phenix Insurance Company, 129 U. S. 397, 453, 459 ..... 6, 7
Marine Bank v. Kalt-Zimmers Manufacturing Company, 293 U. S. 357 (1934) 4
Murray v. Schooner Charming Betsy, 2 Cranch. 64 (1804) 7
Restatement, Conflict of Laws, Sections 358(a) and (e), 360, 364 6
Schooner Exchange v. McFaddon, 7 Cranch. 116 (1812) . 7
Scudder v. Union National Bank, 91 U. S. 406 (1875) .. 6
Seeman v. Philadelphia Warehouse Company, 274 U. S. 403 (1927) 6
United States v. Moser, 266 U. S. 236 (1924) 10, 11
United States v. North Carolina, 136 U. S. 211, 222 (1890) 7

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PETITION FOR REHEARING.

MAY IT PLEASE THIS HONORABLE COURT:

Come now the above-named Respondents, Anglo-Continentale Treuhand, A. G., a Liechtenstein corporation, N. V. Anglo-Continentale Trust Maatschappij (Anglo-Continental Trust Company), a Netherlands corporation, Mondiale Handels-und Verwaltungs, A. G., a Liechtenstein corporation, and Hydropress Handels, A. G., a Liechtenstein cor-

poration, and present this, their petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully show:

1. This cause, together with *Guaranty Trust Company of New York* v. *Henwood et al.* (No. 384) and *Chemical Bank & Trust Company* v. *Henwood et al.* (No. 495) and *Bethlehem Steel Company* v. *Zurich General Accident & Liability Insurance Company, Limited* (No. 590), was argued during the week of February 6, 1939, and by order of this Court entered April 17, 1939, was restored to the docket and assigned for reargument on April 24, 1939, and was reargued during the week of April 24, 1939.

2. (a) This motion is made pursuant to Rule XXXIII of the Rules of the Supreme Court of the United States.

(b) Respondents intend to move this Honorable Court for an order staying the issuance of its mandate herein pending the hearing and determination of this petition for rehearing, and pending a determination upon such rehearing, if granted, and pending the further order of this Honorable Court.

3. The majority opinion herein rests its decision in substantial part upon the majority opinion in Nos. 384 and 495, October Term, 1938. *Guaranty Trust Company of New York* v. *Henwood et al.*, and *Chemical Bank & Trust Company* v. *Henwood et al.*; . . . U. S. . . .

4. The majority opinion in the instant case (Clerk's Advance Sheet, p. 2) states that in the absence of any claim of international rights based upon the treaty provisions of the Constitution, it is enough that Respondents' bonds are "obligations payable in the money of the United States."

The question of treaty provisions was not raised in the courts below by Petitioner, nor upon the briefs or oral arguments in this Court, and under such circumstances the question of rights based upon the treaty provisions of the Constitution was not discussed by Petitioner. Treaty rights, if any, which may be affected, are treaty rights not only with

Holland, but also treaty rights with any other country, since nationals of countries other than the place of payment (Holland) might be affected. It is respectfully submitted, however, that whether or not any rights accrue to Respondents based upon the treaty provisions of the Constitution, principles of international law and principles of comity with foreign nations should induce a revision of the decision of the majority and permit the guilder payment sought. The impact upon the domestic economy, and the effect upon coin and currency of the United States (if any), is equally as great in the case of simple guilder contracts as it is in the case of the alternative promises herein sued upon.

5. The majority opinion reaches the conclusion that the promise herein to pay guilders abroad was specifically condemned by the Joint Resolution.[1] It is respectfully submitted that, upon reconsideration, it will be found that the Joint Resolution does not condemn and that no public policy inhibits such payment. The portion of the report of the Senate Committee on the Resolution quoted in the majority opinion (p. 7 of the Clerk's Advance Sheet in Nos. 384 and 495) relates to "the withdrawal and hoarding of gold," and it is respectfully submitted that promises to pay foreign moneys (although contained in instruments which at the same time contain promises to pay United States dollars) are not mentioned in the report, and do not appear to have been considered by Congress, and therefore that this Court should, on further consideration, revise its decision and hold that the Joint Resolution does not condemn the payment here sought (see cases cited at pp. 25-26 of our main brief).

6. The majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, pp. 2 *et seq.*) states that the bonds there involved were issued and sold in the United States, that purchasers paid dollars, that interest was regularly paid in dollars, and that in that case the asserted right to guilder payment was authorized by the terms of the mortgage securing the bonds.

[1] 48 Stat. 112, 31 U. S. C. A. 463.

At bar, however, bonds were sold in foreign countries, foreign moneys were paid (R. 78, 81), interest was paid in foreign currencies (R. 58-59) and the right to guilder payment is sued upon by the bondholders in their individual rights, irrespective of any terms of the mortgage.[2]

In the majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, p. 5) it is also stated, among other things, that the debtor was not required to keep any foreign offices; a different circumstance prevails in the case at bar, where the debtor agreed to pay "at **designated offices** in said foreign cities and countries" (form of bond, R. 28), and where Petitioner in fact actually maintained such foreign offices (see, for instance, typical allegation in moving affidavit concerning presentment for payment "in Amsterdam, Holland, at the office or agency of the defendant, Hope & Co.," R. 45 etc.).

7. (a) In the interpretation of the contract at bar (viz., that it was a contract to pay foreign moneys abroad), involving as it does the construction of a negotiable instrument, the construction of the highest State Court is binding upon this Court. *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487 (1934); *Marine Bank* v. *Kalt-Zimmers Co.*, 293 U. S. 357 (1934); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938).

Under such circumstance, the construction of these bonds and coupons by the highest New York State Court (the Court

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[2] As a matter of fact, in the instant case, it appears that Petitioner "made * * * provision whereby owners of such bonds residing in foreign countries, upon presentation and surrender of the coupons appurtenant thereto for the purpose, **have received** * * * payment thereof in such countries and in the currencies of such countries in the amount specified in such coupons for such countries" (R. 58).

The majority opinion does not deal with the question of the right of a person who owned bonds prior to June 5, 1933, and who still owns such bonds, and who collected his coupons in guilders in Holland prior to 1933, to continue to collect such coupons in guilders after that date; nor with the right of the successors in interest of any such person.

It is a fact, for instance, although not in the record in this case, that a list of bond numbers has been published in Amsterdam, as being bonds upon which Petitioner would continue to pay coupons in guilders for the reason that it had ascertained that on June 5, 1933 and continuously thereafter, such bonds were owned by a *bona fide* resident or residents of a country or countries other than the United States, and Petitioner itself has conceded its liability to pay the coupons upon such bonds in guilders and that it has so paid and would continue to pay the same (see letter of August 7, 1934, written in behalf of Petitioner, R. 59; see form of statement required by Petitioner in connection with such payments, R. 60-a).

of Appeals) should be binding upon this Court, and the decision arrived at should be reconsidered.

(b) The law of the State of New York, in the courts of which this action was originally brought, is to the effect that the bonds may be sued upon at maturity as independent negotiable instruments, irrespective of the terms of the mortgage, and are not limited thereby. *Enoch* v. *Brandon*, 249 N. Y. 263 (1928); *General Investment Co.* v. *Interborough R. T. Co.*, 200 App. Div. 794, 800 (1922), aff'd 235 N. Y. 133 (1923); *Cunningham* v. *Pressed Steel Car Co.*, 238 App. Div. 624 (1933), aff'd 263 N. Y. 671 (1934).

(c) The law of the State of New York is also that the coupons here sued upon are independent negotiable instruments and may be sued upon at maturity, irrespective of the provisions of the bonds or of the mortgage, and not limited thereby. *Evertson* v. *National Bank of Newport*, 66 N. Y. 14 (1876), cited with approval in *Chase National Bank* v. *Faurot*, 149 N. Y. 532, 536 (1896).

(d) The language in the bonds here in suit referring to the trust mortgage (R. 28) does not, under New York law, limit the right of the holder of the bonds or coupons, at the maturity date, to sue for the recovery of the money amount. See cases cited under Points 7 (b) and 7 (c), *supra*.

(e) No attempt has been made at bar to enforce any of the provisions of the mortgage itself.

(f) The reasoning of the decision in Nos. 384 and 495, therefore, does not apply to the instant case.

8. In No. 384 the action was brought by a corporate trustee under the terms of the indenture, which in that case was stated by the majority to be a domestic obligation.[3]

[3] In the majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, p. 5) the majority refers to responsibilities and duties of the trustee under the mortgage as domestic obligations. The judicial proceedings therein referred to, to be had in this country, relate to proceedings concerning the distribution of the assets, viz., the foreclosure of the mortgage, a circumstance not present in the instant case where the bondholders sue upon the coupons, in their individual right, and where no attempt is made to proceed under any provision of the mortgage.

At bar, however, the suit is brought by the holders of the coupons in their individual right, upon the coupons themselves—an international "obligation" (without reference to the mortgage indenture)—and the law of the place of performance of the coupons (at bar, Holland)—rather than the law of the place of making or even of the performance of the mortgage—should determine their interpretation, their nature, and the obligations enforceable under them. *Restatement, Conflict of Laws*, Secs. 358 (a) and (e), 360, 364; *Scudder* v. *Union National Bank*, 91 U. S. 406 (1875); *Sceman* v. *Philadelphia Warehouse Co.*, 274 U. S. 403 (1927).

9. The decision of the majority, holding in effect that the obligation may be discharged by payment in lawful money, does not treat with the question of the right of the holder of the bonds and coupons to present and demand payment thereof, according to their tenor, in foreign countries (at bar, Amsterdam, Holland), in the respective foreign countries, nor with the obligation of Petitioner in respect of such a demand. The decision of the majority does not indicate whether a holder of these multiple currency instruments, payable in various countries in various currencies, must now present such instruments in America only, or may still present the same abroad, although the decision does hold that the obligation may be discharged in lawful American dollars.

10. *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 453, 459 (1889) (cited at p. 7 of the Clerk's Advance Sheet in Nos. 384 and 495), involved the determination of a contract of affreightment in so far as regarded the effect of a stipulation exempting the company from responsibility for the negligence of its servants in the course of the voyage. The general rule applicable to the forum in which tort actions may be brought (viz., that the proper forum is the place where the injury occurred) was therefore applicable in that case, and the stipulation was therefore unenforceable *ab initio*. At bar, however, the obligation related to the enforcement of a contract. Thus, a determination as to the law

applicable to a tort action, as construed in *Liverpool Steam Co.* v. *Phenix Insurance Co.*, would appear not to be applicable to the circumstances here at bar, and the law of the place of performance should be applied. See Point 8, *supra*.

11. *United States* v. *North Carolina*, 136 U. S. 211, 222 (1890), cited in footnote No. 4 of the majority opinion in Nos. 384 and 495 (Clerk's Advance Sheet, p. 7), involved a suit between sovereigns and it does not appear that the State of North Carolina had subjected itself to the laws of New York. The decision in that case therefore seems inapplicable at bar. Cf. *Murray* v. *Schooner Charming Betsy*, 2 Cranch. 64 (1804); *The Apollon*, 9 Wheat. 362 (1824); *Schooner Exchange* v. *McFaddon*, 7 Cranch. 116 (1812).

Further, in the cited case the decision rests partly upon the conclusion that the intention of the parties was *merely to promote the convenience* of bondholders in making the bonds payable in two separate cities, whereas at bar the express intention was to make payments in foreign monetary units abroad. See Point 12, *infra*.

12. At page 10 of the opinion in Nos. 384 and 495, the majority of this Court make the following statement:

> "Here, the admitted purpose of the multiple currency provision supplementing the gold clause was the same as that of the gold clause itself, that is, to afford creditors of United States debtors on domestic money obligations contractual protection against possible depreciation of United States money."

Whether or not such purpose was admitted in Nos. 384 and 495, no such purpose was admitted in the instant case, and the contrary is the fact. The offering in England and in Holland, considered in the further light of the Dutch offering circular in the Dutch language, supplemented by the listing of these bonds upon the London and Amsterdam Stock Exchanges and the trading thereof in Amsterdam (R. 56), further supplemented by

the statement of Petitioner itself (quoted also at p. 20 of "Respondents' Reply Brief to Brief for the United States as *Amicus Curiae*," dated May 2, 1939), clearly show that **"the apparent purpose of providing for payment of the interest on and the principal of such bonds in foreign countries was * * *" to enable "* * * residents of such countries * * * to collect such interest and principal at the respective maturity dates in such countries and in the currencies of such countries in specified amounts. * * *"** (R. 58), **and not to protect against possible depreciation of United States money.**

Whatever, therefore, may have been the intention in Nos. 384 and 495 in respect of tying the guilder payment to the dollar, **an express contrary intention appears in the instant case**; it was always intended that the bonds and coupons should evidence actual guilder debts; it seems to follow that whatever the decision in Nos. 384 and 495, the decision in the instant case should support the right of these foreign bondholders and coupon holders to enforce payment in guilders.

13. No attempt is made at bar to enforce payment of the gold value of the dollar, or indeed the gold value of any other currency. Inasmuch as our law does not provide a method of specific performance for the payment of foreign currencies, the suit takes the form of one for damages only inasmuch as foreign money is a commodity in this country. It would appear that the majority overlooked this circumstance in arriving at its conclusions.

14. The majority opinion is predicated in part (Clerk's Advance Sheet in Nos. 384 and 495, p. 9; Clerk's Advance Sheet in the instant case, p. 1) upon the fact that no demand for payment in foreign currency was made until after the effective date of the Joint Resolution.

If the fair inference from these statements is that guilder payments might have been enforced had election for such payment been made before the effective date of the Joint Resolution, then this portion of the opinion would appear not to be in harmony with so much of the majority opinion

as rests its decision upon the ground that a contract to pay guilders (whether or not exercised) is condemned by the Joint Resolution because contained in the same instrument which contains the contract to pay dollars, and that the word "obligation" refers to the instrument rather than to the particular duty to pay gold dollars contained therein.

Even had election been made prior to June 5, 1933, the instrument would after that date nevertheless have contained within itself the unexercised promise to pay gold dollars. If an election prior to June 5, 1933, would have preserved the right to demand guilder payments thereafter, then a similar election after June 5, 1933, should have given rise, in the instant case, to a similar right.

15. At page 9 of the Clerk's Advance Sheet in Nos. 384 and 495, the majority opinion states that "on the date the Resolution went into effect no election had been made so that the railroad was, at that time, still under obligation to pay dollars." But it seems that the majority has not taken into consideration the fact that on that same day the railroad was also, at the same time, still under obligation to pay guilders. There could be independent contracts or obligations, and in fact there were. In No. 384, for instance, the independent obligation under the indenture was sued upon by the trustee; in the instant case, the separate, independent obligation upon the coupons was sued upon by the bondholders themselves. A mortgage, bonds and coupons could all be separate, independent evidences of the same debt. The obligation of the debtor was divided into at least as many separate and independent obligations to pay the same loan as there were separate instruments evidencing the loan, viz., the mortgage, the bonds and the coupons sued upon (see, *per contra*, majority opinion in Nos. 384 and 495, Clerk's Advance Sheet, p. 8). And by the same token it would appear that there could be and were at bar separate and independent contracts or obligations contained within the same instrument itself, viz., the alternative currency payments, which, in the case of the foreign moneys (in the instant case at least), were not tied to or dependent upon either (1) gold, or (2) a particular

kind of coin or currency of the United States, or (3) an amount of United States money measured by gold or a particular kind of United States coin or currency. It is respectfully submitted that the majority overlooked this circumstance in rendering its decision.

16. This Court has not specifically determined Respondents' right to receive interest, even upon the admitted face dollar amount, and may have overlooked the fact that nowhere does the amended answer allege nor does the evidence prove the readiness or willingness of Petitioner herein to pay even the dollars which it concededly owed (see pp. 94 *et seq.* of our main brief, particularly p. 96).

The typical allegation in the amended answer which comes closest to a tender (but which falls short thereof) is paragraph numbered 62 thereof (R. 40), which does not constitute a tender. And this Court has further apparently overlooked the memorandum of Mr. Justice Cohn[4] in the Appellate Division (First Department) of the New York Supreme Court specifically providing that Respondents are entitled to interest from the date the coupons were presented for payment. Respondents are entitled to interest since the right to interest is a State Court question (viz., did Petitioner make a proper tender?), and Respondents' right thereto has been conceded both by the Appellate Division and by the Court of Appeals, with the necessary conclusion therefrom that no proper tender was made. Consequently this Court should allow interest to Respondents.

17. The majority did not pass specifically upon the question of *res adjudicata* raised at pages 84 *et seq.* of our main brief, nor upon the point that a supervening interpretation of a statute, which holds erroneous the previous construction upon which the first judgment was based, neither requires nor permits the abrogation, in whole or in part, of the doctrine of *res adjudicata*. *United States* v. *Moser*, 266 U. S. 236

[4] Who wrote for the majority of the Appellate Division, which took the same position as to the impact of the Joint Resolution upon the coupons here sued upon as the majority of this Court has taken.

(1924). It is respectfully submitted that the majority overlooked the fact that as to Respondents Anglo-Continentale Treuhand, A. G., and Mondiale Handels-und Verwaltungs, A. G., judgment should be rendered for them upon the doctrine of the *Moser* case, irrespective of any decision in any other case or as to any of the other Respondents.

18. It is respectfully suggested that in basing its decision in the instant case in large part upon the opinion in Nos. 384 and 495, the majority of this Court did not take into account the essential difference in the character of the transactions, nor the essential differences between the cases as outlined in part above. It is undisputed in the present record (R. 69)—(a fact not mentioned by the majority in its opinion, and a circumstance quite different from that which obtained in Nos. 384 and 495)—that the "purchases between January and August"[5] were made "in reliance on January letter * * *"[6] and that the purchases "were all made to protect obligations in currencies other than dollars."

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Court of Appeals below be, upon further consideration, affirmed, and that Respondents have such other, further and different relief as to this Honorable Court may seem just and proper in the premises.

Dated, New York, May 25, 1939.

Respectfully submitted,

HARRY HOFFMAN,
Counsel for Respondents.

HARRY HOFFMAN,
CLIFFORD R. SCHUMAN,
of Counsel.

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[5] 1934.

[6] Petitioner's letter of January 11, 1934, quoted at R. 57 and 58, a portion of which is set forth *supra* at page 8.

Certificate of Counsel.

I, HARRY HOFFMAN, counsel for the above-named Respondents, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

HARRY HOFFMAN,
Counsel for Respondents.